Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA and LAWTON CHILES, Governor,
Cross-Petitioners

v.

SEMINOLE TRIBE OF FLORIDA,
Cross-Respondents

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Court should have engaged in comment affecting the duties and responsibilities of the parties in part V of the opinion after holding that there was no subject matter jurisdiction?

Whether the remedy created by the Court in part V of its opinion can be found within IGRA and whether it is consistent with the intent of Congress in the passage of IGRA?

Whether the Court below improperly engaged in severability analysis creating a new remedy for the Tribe, where the court merely addressed the validity of a jurisdictional bar to the instant suit?

PARTIES

The caption contains the names of all parties to this action in the court below in the captioned case.

Parties in the case consolidated on appeal with this case in the Eleventh Circuit were:

Poarch Creek Indians and Poarch Band of Creek Indians,
Plaintiffs/Appellants

State of Alabama and James E. Folsom, Governor,
Defendants/Appellees.

Amici curiae in the Eleventh Circuit were:

National Indian Gaming Association

The Tunica Biloxi Tribe

The States of:

California	Nevada
Connecticut	Oklahoma
Kansas	South Dakota
Mississippi	Washington
Montana	Wyoming
Nebraska	

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OPINIONS BELOW

The opinion and judgment of the Eleventh Circuit is reported as *Seminole Tribe of Florida v. State of Florida, et al.*, and *Poarch Creek Indians v. State of Alabama, et al,* 11 F. 3d 1016 (11th Cir. 1994) and is submitted as appendix A.

The opinion of the District Court in this case is found at *Seminole Tribe of Florida v. State of Florida, et al.*, 801 F.Supp. 655 (S.D. Fla. 1992) and is submitted as appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit, review of which is sought here, was entered on January 18, 1994. On April 6, 1994, the Eleventh Circuit entered an order denying timely motions for rehearing and suggestions for rehearing *en banc*. By order of April 28, 1994, the mandate was stayed.

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and Rule 12.3 of the Rules of the Supreme Court. The date of receipt of the Petition for *Certiorari* in connection with which this cross-petition is filed was July 1, 1994, docket number 94-12.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extent to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Relevant portions of 25 U.S.C. § 2701, *et seq*, are set forth in the appendix, separately bound, at Appendix F.

STATEMENT UNDER RULE 29.4(b)

Since the constitutionality of the Indian Gaming Regulatory Act, an act of Congress affecting the public interest, may be drawn into question, 28 U.S.C. § 2403(a) may be applicable and this document will be served on the Solicitor General.

The Court of Appeals certified to the Attorney General that the constitutionality of an act of Congress might be drawn into question and the Attorney General declined to appear below.

STATEMENT OF THE CASE

NATURE OF THE CONTROVERSY

The Indian Gaming Regulatory Act (IGRA) establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166-68. It is the result of years of legislative debate and prior judicial decisions. S.Rep. 100-446, 100th Cong., 1st Sess. 1-5, 1988 U.S.C.C.A.N. 3071-3076.

Under IGRA, Congress created three categories of gambling. The issues before this Court relate to class III gambling, which includes all forms of gambling other than traditional Indian social games and bingo. 25 U.S.C. § 2703(8). Class III gambling is lawful only in a state which permits such gambling for any purpose, by any person, entity or organization. 25 U.S.C. § 2710(d)(1)(B).

A Tribe desiring to conduct class III gambling must request the State in which the Indian lands are located to negotiate a Tribal-State compact governing such gambling. The State, pursuant to IGRA, must negotiate in good faith with the Tribe. 25 U.S.C. § 2710(d)(3)(A).

If the State fails to negotiate or fails to negotiate in good faith, the IGRA provides that a Tribe can initiate a suit in federal district court. 25 U.S.C.§ 2710(d)(7)(A)(i)

If the court finds that the state has not acted in good faith, then the court will direct the state and the Tribe to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii) If a compact is not completed within that time, the court can then appoint a mediator. 25 U.S.C. § 2710(d)(7)(B)(iv) The State and the Tribe are directed to propose their last best offer and the mediator is required to select the one of the two submitted compacts which best comports with the IGRA, other applicable federal law, and the findings and order of the court. *Id.*

The State and the Tribe then have 60 days to agree to the selected compact. 25 U.S.C. § 2710(d)(7)(B)(v)-(vii) If the parties still cannot agree to execute a compact within that time, then the mediator transmits the selected compact to the Secretary of the Interior. Only at this point is the Secretary empowered to prescribe regulations for the implementation of class III gambling consistent with the terms of the chosen compact, IGRA, and State law. 25 U.S.C. § 2710(d)(7)(B)(vii)

After finding that the States could validly interpose a defense of the Eleventh Amendment to a suit by a Tribe under 25 U.S.C. § 2710(d), the Circuit Court below went on to discuss the effect of its ruling and fashion a remedy for the Tribes that is not otherwise found in the IGRA and which is contrary to the clear intention of Congress for State participation. This discussion violates the dictates of precedents of this Court and implicates important issues regarding gambling on Indian Reservations governed by the processes in IGRA.

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

On September 19, 1991, Plaintiff, Seminole Tribe filed its complaint in the District Court alleging that the State of Florida had failed to negotiate in good faith for the completion of a Tribal-State compact for gambling operations pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, *et seq.* [Vol. 1, Doc. 1] The State defendants moved to dismiss the case based on the immunity afforded in the Eleventh Amendment on December 16, 1991. [Vol. 1, Doc. 14] Oral argument was heard by the Court on January 13, 1992 and the Court issued its order denying the motion on June 18, 1992. [Vol. 2, Doc. 46] A timely notice of appeal was filed July 9, 1992. [Vol. 2, Doc.47]

By motion dated August 22, 1992, Plaintiff Tribe moved to consolidate this case with *Poarch Band of Creek Indians v. Alabama,* case no. 92-6244 and that motion was granted by order dated October 1, 1992.

Briefs were filed by all parties in November and December, 1992 and oral argument was held before the Court on January 4, 1993. By opinion dated January 18, 1994, the 11th Circuit Court of Appeals reversed the lower Court's denial of Florida's motion, remanding with instructions to dismiss the case, and affirmed the Alabama District Court's dismissal of the Poarch Band case. The Appeals Court held that the Eleventh Amendment immunity of the States could not be abrogated by Congress pursuant to its authority under the Indian Commerce Clause, Art. I, § 8, cl. 3, U.S. Const., and that none of the established exceptions to the State's Eleventh Amendment Immunity were applicable. Therefore, the Court found that it lacked subject matter jurisdiction.

During the pendency of the appeal in the *Seminole* case, the State of Florida and the Seminole Tribe agreed to proceed with cross-motions for summary judgment on the merits in the Court below. After extensive briefing and oral argument, the District Court issued an order and opinion defining the proper scope of negotiations for Florida and the Seminole Tribe. The Court below also specifically found that Florida had not violated IGRA because it had negotiated in good faith for the completion of a compact with the Seminoles.[1]

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1 That case is currently on appeal to the 11th Circuit, docket number 93-5256. That case has been abated pending the outcome of the Seminole Tribe's Petition for *Certiorari* to this Court, docket number 94-12. A copy of the district court's final order on summary judgment is provided in appendix E.

REASONS FOR GRANTING *CERTIORARI*

This Court should exercise its powers of supervision over the 11th Circuit because that court ignored binding precedent and went forward with the creation of a remedy for the Tribes in the face of an assertion of a valid 11th Amendment defense after holding that the case should be dismissed for lack of subject matter jurisdiction.

The addition of part V of the lower court's opinion created a split among the circuits on the issue of remedies. The 8th Circuit made no comment. *See Cheyenne River Sioux Tribe v. South Dakota,* 3 F. 3d 273 (8th Cir. 1993). The court below in this case created a remedy for a tribe faced with a state which asserts its 11th Amendment immunity and the 9th circuit stated that the remedy created by the 11th circuit "pervert[s] the Congressional plan." *Spokane Tribe of Indians v. Washington State,* ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994).

Finally, the remedy provided by the court below is not found in the statute and is inconsistent with the intent of Congress which involved the careful balancing of the interests of the Federal, State, and Indian governments. The 11th Circuit's attempt to legislate a new remedy is inappropriate and it should be left to Congress to reevaluate the balance of interests and purposes of this act in fashioning a new remedy, if one is needed.

WHEN A COURT DISMISSES A CASE FOR LACK OF SUBJECT MATTER JURISDICTION IT IS INAPPROPRIATE TO MAKE SUBSTANTIVE DECISIONS CONCERNING THE RIGHTS AND RESPONSIBILITIES OF THE PARTIES

The Court below determined that:

> the States retain their sovereign immunity and the federal Courts do not have subject-matter jurisdiction over suits brought under IGRA.

Seminole Tribe of Florida v. State of Florida, et al., 11 F. 3d 1016, 1019 (11th Cir. 1994). The Court went on to hold that absent one of the accepted exceptions:

> [T]he Eleventh Amendment serves as a jurisdictional bar and precludes federal Court adjudication over these suits.... [T]hese cases must be dismissed for lack of subject matter jurisdiction.

Id. at 1029. While the Eleventh Amendment is often referred to in terms of sovereign immunity, the Court below correctly characterized the amendment's bar as ***jurisdictional***. Once the Court determines that subject matter jurisdiction is lacking, it is inappropriate to make substantive decisions, in this case creating a remedy, concerning the rights and responsibilities of the parties.[2]

This Court has noted that when considering a jurisdictional question, analyzing and commenting on the substantive aspects of the case is inappropriate. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf and Eddy,* 506 U.S. ___,

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2 Although arguably *dicta*, part V of the 11th Circuit's opinion has generated applications to the Secretary of the Interior pursuant to the language of that section. Part V has also generated a conflicting opinion from the 9th Circuit. *Spokane Tribe of Indians v. Washington State,* ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994)

121 L.Ed.2d 605 (1993) addressed the appealability of denial of an Eleventh Amendment defense. The Court there found that such a denial could be appealed and remanded the case for further proceedings, stating:

> Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection...whose resolution will generally have *no bearing on the merits* of the underlying action.

Id., 121 L.Ed.2d at 613 (citation omitted, emphasis added). Addressing the specific question raised herein, this Court stated:

> Because the Court of appeals dismissed the appeal on jurisdictional grounds, it did not consider the merits of PRASA's Eleventh Amendment defense and [took] no view as to whether PRASA is actually entitled to the claimed immunity.... We likewise *express no view on the merits* of the immunity claim.

Id., 121 L.Ed.2d at 611 (citation omitted, emphasis added).

In another case where jurisdiction was the question, this Court also declined to address the merits of the claims, holding:

> Consequently, this appeal must be dismissed for lack of jurisdiction *without our considering the merits* of the case.

United States v.Sisson, 399 U.S. 267, 270 (1970). Recognizing its inability to reach the merits because of the lack of jurisdiction, this Court stated:

> We have today granted certiorari in Gillette v. United States...and Negre v. Larsen...in order to consider the "selective" conscientious objector issue that underlies the case now before us but

> which *we cannot reach because of our conclusion that we have no jurisdiction* to entertain this direct appeal.

Id. at 270n.1 (citations omitted, emphasis added).

Finally, the 11th Circuit itself recognized the impropriety of making substantive comment where jurisdiction is lacking in *The News Journal v. Foxman,* 939 F. 2d 1499 (11th Cir. 1991), holding:

> In denying the News-Journal's motion for reconsideration based on *Younger,* the district Court also commented upon the substance, particularly the scope, of the restrictive order. In essence, the district Court analyzed the restrictive order under the First Amendment, although it abstained under *Younger. Any substantive commentary and analysis is inconsistent with abstention for lack of jurisdiction* based on *Younger.*

Id. at 1511 (emphasis added). *Foxman* involved abstention under *Younger;* this case involves lack of subject matter jurisdiction under the Eleventh Amendment. It was even more important for the Court below to refrain from "analyz[ing] the effect of [its] holding"[3] when the jurisdictional bar of the Eleventh Amendment is involved.

This Court should exercise its power of supervision over the actions of the 11th Circuit and remove the discussion of the effect of the court's holding that the case should be dismissed for lack of jurisdiction. That discussion flies in the face of the clear dictates of this Court and the 11th Circuit itself that where subject matter jurisdiction is lacking, the case should be dismissed without any substantive comment.

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3 *Seminole Tribe,* 11 F. 3d at 1019.

THE REMEDY SUGGESTED IN PART V OF THE LOWER COURT'S OPINION IS NOT FOUND IN IGRA AND IS INCONSISTENT WITH THE INTENT OF CONGRESS REGARDING THE ROLE OF THE STATES IN THE COMPACT PROCESS

As the Court below recognized in its analysis of the Tribes' alleged "liberty interest" arising from *Board of Regents v. Roth,* 408 U.S. 564 (1972), the compacting process envisioned by IGRA is discretionary.

> IGRA does not create an entitlement to operate gambling operations; rather, it establishes the process and standards by which gambling may be conducted on Indian lands.

Seminole v. Florida, 11 F. 3d at 1025. That process is set forth in 25 U.S.C. § 2710(d).

The process for class III gambling under IGRA can be outlined briefly as follows:

1. Class III activities are lawful only under a Tribal ordinance, in a state that permits such gaming, and under the terms of a Tribal State compact. § 2710(d)(1)

2. The Tribe must request that the State enter into negotiations for the completion of a compact. The State is required to negotiate in good faith. § 2710(d)(3)

3. Compacts must be approved by the Secretary of the Interior. § 2710(d)(3)(B)

4. If the State fails to enter into negotiations or fails to negotiate in good faith, the Tribe can, after 180 days from the initial compact request, file suit in the United States District Court. § 2710(d)(7)(B)(i)

5. The Court shall order the Tribe and the State to conclude a compact within 60 days, ***if and only if*** it finds that the State has not negotiated in good faith. § 2710(d)(7)(B)(iii)

6. If a compact is not completed within the 60 day period, then the Court shall appoint a mediator who shall pick a compact from the last best offers of the State and the Tribe. The compact selected must be the one which best comports with the terms of the Act (IGRA), other applicable federal law and the findings and order of the Court. § 2710(d)(7)(B)(iv)

7. The State and the Tribe then have 60 days in which to accept the mediator's choice. Absent that consent, the *mediator* shall inform the Secretary (of Interior) and the Secretary shall prescribe regulations for class III gambling which are consistent with the proposed compact chosen by the mediator, the provisions of IGRA, and the relevant provisions of the laws of the state. § 2710(d)(7)(B)(vii)

The process set forth in part V of the lower Court's opinion is not found in these provisions of IGRA. The Court would delegate to the Secretary of the Interior both the determination of good faith and of the scope of gambling permitted in the State. Congress, however, granted the Secretary limited *regulatory* discretion in § 2710(d)(7)(B)(vii) — the power to prescribe regulations consistent with a mediators choice of compact. This subsection does not grant the Secretary the *legislative* discretion to decide what class III gambling to permit or not permit. *See American Federation of Gov. Employees v. Pierce,* 697 F. 2d 303, 306 (D.C. Cir. 1982). While a such a broad delegation might be upheld, *see Mistretta v. U.S.,* 488 U.S. 361, 373-74 (1989), IGRA, by contrast, grants only a limited regulatory discretion. *See Panama Refining Co. v. Ryan,* 293 U.S. 388, 415-30 (1935).

It is inappropriate for a federal executive official to make these determinations where Congress left them to the States and Tribes as equal partners at the bargaining table.

Also under part V, there is no need for a finding of lack of good faith on the part of the state, which is the condition precedent for all of the mediation and Secretarial involvement under the terms of the IGRA. All subsections after § 2710(d)(7)(B)(i) are inextricably entwined with the preceding subsections. Clause (vii), upon which the court below depended for its remedy, by its very terms depends on the preceding clauses for its meaning, to wit:

> If a State does not consent during the 60 day period described in *clause (vi)* to a proposed compact submitted by a mediator under *clause (v)*, the *mediator shall notify the Secretary* and the Secretary shall prescribe, in consultation with the Indian Tribe, procedures —
>
> (I) which are *consistent with the proposed compact selected by the mediator* under *clause (iv)*, the provisions of this Act, and the relevant provisions of the laws of the State, and [] (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added). The Secretary's ***only*** authority to prescribe regulations is not independent of, but is inextricably tied to, the process set forth in §§ 2710(d)(7)(A)(ii) through 2710(d)(7)(B)(vi).

Furthermore, it is the mediator who approaches the Secretary of the Interior and the Secretary is constrained by the terms of the compact chosen by the mediator and State law. 25 U.S.C. § 2710(d)(7)(B)(vii) The process outlined by the Court below ignores these constraints and, as a practical matter, removes the State from the process entirely. The Tribe need only request a compact and file suit after 180 days regardless of the behavior of the State. Missing from the Court's proposed remedy and essential to the statutory process is the finding of bad faith and the

intercession of a mediator who presents a compact to the Secretary. Under no provision of the Act can the Tribes petition the Secretary and under no provision of the Act can the Secretary prescribe regulations when the State has been negotiating in good faith.[4]

The Court's *dicta* in part V ***creates*** a remedy inconsistent with the plain language of the statute in an effort to grant a remedy to the Tribes.[5] The Court then goes on to say that the new remedy is consistent with the intent of Congress. In doing so, the Court has sacrificed the States' role in an effort to effectuate its notion of the broad intent of Congress.

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statutes primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 526 (1987). The process and the remedy set forth in § 2710(d)(7) was:

> [T]he result of the Committee balancing the interests and rights of the tribes to engage in gaming against the interests of the States in regulating such gaming.

S.Rep. 100-446, S. 555, 100th Cong., 2d Sess., 14. The Eleventh Circuit even recognized that IGRA was passed:

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4 The State of Florida had negotiated in good faith but, under part V of the opinion, could be faced with regulations imposed by the Secretary of the Interior for class III gambling. This is not what Congress intended for a state which has complied with the dictates of IGRA, 25 U.S.C. § 2710(d)(3)(A).

5 It is ironic that the court below, in footnote 14, criticized the Washington District Court in the *Spokane* case for doing exactly that.

> [A]fter contentious debate concerning the appropriate state role in the regulation of Indian gaming.

Seminole Tribe, 11 F. 3d at 1019. The 11th Circuit's attempt to legislate a new remedy is inappropriate and it should be left to Congress to reevaluate the balance of interests and purposes of this act in fashioning a new remedy, if one is needed. The Court of Appeals is not free to fashion remedies that Congress has specifically chosen not to extend. *Landgraf v. U.S.I. Film Products,* ___ U.S. ___, n. 36, 62 U.S.L.W. 4255, 4267 n.36 (April 26, 1994); *see Northwest Airlines, Inc. v. Transportation Workers,* 451 U.S. 77, 97 (1981).

The fallacy of this process can be shown by the facts of the case before this Court. The Seminole Tribe requested a compact and proceeded to file suit against the State of Florida. The Court below found that the State had ***not*** failed to negotiate in good faith.[6] *See Seminole Tribe v. Florida,* order on summary judgment, found at appendix E. The Tribe would not, under IGRA as written by Congress, be entitled to mediation or Secretarial involvement. However, under part V of the lower court's opinion, even in the face of a finding of good faith on the part of the State, the Seminole Tribe can apply to the Secretary for procedures. This locks

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6 The Court below thought it was faced with the question of what remedy was left to a Tribe "faced with a State that not only will not negotiate in good faith, but also will not consent to suit." *Seminole Tribe,* 11 F. 3d at 1029. That is clearly not the case. A Tribe may be faced with a state which is negotiating in good faith without reaching an agreement within the 180 day period. Under IGRA, such a Tribe (like the Seminoles herein) is granted no relief. The instant case proves the point. Under the process envisioned by the 11th Circuit, Florida is placed in the position of negotiating in good faith (*see* appendix E), asserting its sovereign immunity, but seeing the Tribe apply to the Secretary of the Interior for regulations for gambling which is criminally prohibited in this State and contrary to its public policy. That is an end not envisioned by IGRA, which allows for gambling on Indian lands only when consistent with the criminal laws and public policy of the State. 25 U.S.C. § 2701(5).

the State out of the process, contrary to the intent of Congress.

Congress did not treat all forms of gaming equally in the passage of the IGRA. Class III gaming is generally barred by the Act. Some of the specific language chosen by Congress in enacting IGRA, and statements made by its principal sponsor, illustrate the understanding Congress had of its intended effect on class III gaming.

In criticizing H.R. 1920, the leading bill of the 99th Congress, Senator Inouye, the prime sponsor of S. 555, and Senator Gorton, stated:

> We oppose H.R. 1920 as reported. The bill allows Indian tribes to engage in, or to allow other persons to engage in, high stakes commercial gaming free from any meaningful control by the states or federal government.
>
> . . .
>
> It is a dangerously deceptive bill because, while it may appear to some to set out meaningful federal supervision over tribal gaming, it actually merely ratifies the status quo and leaves the tribes free to do about what they are already doing in this area.

S. Rep. No. 493, 99th Cong., 2d Sess,. pp. 28-29 (1986).

The bill which Senator Inouye introduced the following year corrected that perceived deficiency. As Senator Inouye stated in opening hearings on S. 555, June 18, 1987:

> In S. 555, which I introduced prior to the Supreme Court's decision in the *Cabazon* case, class III would be banned unless the tribe requests the Secretary to consent to a transfer of jurisdiction to a State for the regulation and enforcement of State laws governing class III gaming.

S. HRG. No. 341,100th Cong., 1st Sess., p. 1 (1987).[7]

The final version of S. 555 contains a similar ban, although it is worded somewhat differently to accommodate IGRA's provision for a negotiated Tribal-State compact. 25 U.S.C. § 2710(d)(1). As the Senate Report indicates, "S. 555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact." Senate Report 100-446, S.555, 100th Cong. 2d Sess., 6.

The reason that Congress deemed it necessary to restrict tribal authority to conduct class III gaming in the absence of State jurisdiction, rather than leave it to a federal oversight agency, is also found the Act, 25 U.S.C. § 2701(3), and in the Senate Report:

> [T]he Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems.

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7 S. 555, as originally introduced (February 19, 1987), defined class III gaming as it appears in the IGRA. However, Section 11(d) of the original bill provided:

> (1) Except as provided in paragraph (2) of this subsection, *class III gaming shall be unlawful on any Indian lands* under section 1166 of title 18, United States Code.
> (2) A gaming activity on Indian lands that is otherwise legal within the State where such lands are located may be exempt from the operation of paragraph (1) of this subsection where the Indian Tribe requests the Secretary to *consent to the transfer of all civil and criminal jurisdiction. ...to the State within which such gaming enterprises is to be located* and the Secretary so consents.

S. HRG. No. 341, 100th Cong., 1st Sess., p. 21 (1987) (emphasis added).

Senate Report 100-446, S.555, 100th Cong. 2d Sess., 13-14 Senator Inouye expanded upon this issue in introducing the legislation on the Senate floor:

> The issue has been how to resolve the clash between States and tribes with respect to sophisticated forms of gaming such as casinos and parimutuel wagering....
>
> *[I]t is simply not realistic for any but a few tribes to set up regulatory systems. Nor did the Select Committee on Indian Affairs view as meritorious any suggestions for the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level....*
>
> Thus, the best option available is the approach taken by the committee on S. 555 and that is the tribal-State compact approach.

Congressional Record, September 15, 1988, S. 12650, col. 2. (Emphasis added.)

Thus, the legislative history of the IGRA, and the final provisions which were adopted into the Act make clear that with regard to the class III gambling at issue in this case the principle function of the IGRA was to eliminate such operations, unless certain restrictive conditions were met. State participation in the compacting and regulatory processes was key to Congress. Neither the federal government nor the Tribes have the ability to regulate this type of gambling.

In IGRA, Congress attempted to provide a process which protected the significant interests of *all* of the parties, the State, Federal, and Tribal governments. Indeed, Congress noted that the entire § 2710(d) was:

> ...the result of the Committee balancing the interests and rights of the tribes to engage in gaming against the interests of the States in regulating such gaming.

Senate Report 100-446, S.555, 100th Cong. 2d Sess. 14. The Committee noted that the provision permitting the tribe to sue the state on the basis of a lack of good faith negotiation was designed as the least offensive option "to encourage the states to deal fairly with the tribes as sovereign governments," *id,* but also noted that the state had legitimate governmental interests to protect. Congress made no provision for the Secretary of Interior to substitute his discretion for that of the state regarding difficult issues of state gambling law. *Spokane Tribe of Indians v. Washington State,* ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994)

Against this background, it is clear that it was critical for Congress to have the States involved in the compacting and regulatory process. The procedure suggested by the Court below in part V of its opinion, by effectively taking the States out of the process, leaves the Secretary with the choice of having the federal government regulate class III gambling or allowing the Tribes to self-regulate; both of these alternatives are contrary to the intent of Congress. Therefore, even if it was proper for the Court to reach the issues in part V of its opinion, the resulting process is inconsistent with the intent of Congress in crafting the delicate compromise which became IGRA.

THE COURT BELOW ERRONEOUSLY ENGAGED IN SEVERABILITY ANALYSIS WHERE IT MERELY ADDRESSED THE VALIDITY OF THE JURISDICTIONAL BAR OF THE ELEVENTH AMENDMENT

The question presented to the Appeals Court (in its own words) was:

> [W]hether Congress successfully abrogated the States' Eleventh Amendment sovereign immunity from suit by enacting the Indian Gaming Regulatory Act[.]

Seminole v. Florida, 11 F. 3d at 1018. The answer to that question was:

> Congress did not possess that power when enacting IGRA under the Indian Commerce Clause, U.S. Const art. I, § 8, cl. 3. Thus, the States retain their sovereign immunity and the federal Courts do not have subject matter jurisdiction over suits brought under IGRA.

Id. at 1019. Both the question posed, and the answer given, address the validity of the jurisdictional bar of the 11th Amendment. In part V of the opinion, the court, discussing the effect of its ruling, states that:

> One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district Court.

Id. at 1029. This procedure outlined by the Court must necessarily envision the continuing validity of 25 U.S.C. §§ 2710(d)(7)(A)(i) and (B)(i). These sections maintain their viability where a state consents to suit. *Id.* at 1029n.15. Engaging in severability analysis under 25 U.S.C. § 2721 is inappropriate where the court merely

addresses the validity of a jurisdictional bar.[8] All of the cases involving questions of severability which could be found involved a section of an act which was declared unconstitutional, not the case here.

All the court below did was validate a defense available to the States. If Congress mistakenly assumed that that defense was unavailable to the States, then it is up to Congress to reevaluate the compromise which became IGRA in light of this defense. It is not appropriate for the Court below to rewrite the statute and fashion a remedy which, as has been shown, *supra*, is nowhere to be found in the statute as written and is inconsistent with the

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8 In *Apache Tribe of the Mescalero Reservation v. New Mexico*, slip op. CIV 92-076-JC (12-22-92)(DCNM), the district Court stated:

> As in my order denying the Pueblo of Sandia's motion to amend or alter the dismissal order in CIV 92-613JC, I further determine that it would be *improper for this Court to address the severability issue* raised by the Apache Tribe of the Mescalero Reservation.

intent of the law to include the states as participants in the process of approving Indian gambling within the respective States.[9]

9 In a recently decided case, the Ninth Circuit Court of Appeals found that Congress could abrogate the States' 11th Amendment immunity in IGRA and, in doing so, commented on the remedy addressed in this Cross-Petition, stating:

> The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of the Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. *Seminole Tribe*, 11 F. 3d at 1029. In our view, however, ***such a result would pervert the Congressional plan.*** This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii). The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the Congressional aim of state participation.

Spokane Tribe of Indians v. Washington State, ___ F. 3d ___, 1994 WL 316443, *6 (9th Cir. 1994) (emphasis added).

CONCLUSION

This court should grant *certiorari* in this cross petition and remand this case to the appeals court below with instructions to revise its opinion, excising the discussion in part V. This court should grant *certiorari* because the court below has sufficiently departed from the accepted and usual course of judicial proceedings by commenting on and deciding the merits of a case after holding that there was not subject matter jurisdiction; for creating a remedy which is inconsistent with Congress' clearly stated intent to protect the interests of the states by requiring their participation in the regulation of class III gambling; and for engaging in severability analysis creating a remedy for the Tribe where the court merely addressed a jurisdictional bar.

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